



Economic Impact Analysis Virginia Department of Planning and Budget

16 VAC 25-60 – Administrative Regulations for the Virginia Occupational Safety and Health Program (VOSH) **Department of Labor and Industry** October 17, 2005

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with Section 2.2-4007.H of the Administrative Process Act and Executive Order Number 21 (02). Section 2.2-4007.H requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. The analysis presented below represents DPB's best estimate of these economic impacts.

Summary of the Proposed Regulation

The Safety and Health Codes Board proposes to amend the Administrative Regulations for the Virginia Occupational Safety and Health Program (VOSH) in several substantive ways:

- This proposed regulation will allow the Department of Labor and Industry (DOLI) enforcement tools for cases involving public sector workplaces. Specifically, public employers and employees will be subject to the same civil and criminal penalties for obstructing a VOSH investigation as are their private sector counterparts.
- To reflect changes in Federal Occupational Safety and Health Administration (OSHA) regulations, the distinction in VOSH between formal and informal complaints is being eliminated.

- The proposed regulation will allow public access, subject to restrictions enumerated in the Freedom of Information Act (FOIA), to file documents in contested complaint cases once those documents have been subpoenaed or requested during discovery.
- In response to judicial findings in *Ray Davenport, Commissioner of Labor and Industry v. Summit Contractors*, DOLI's longstanding multi-employer worksite policy is being promulgated as a part of the Virginia Administrative Code.

Estimated Economic Impact

Although both private and public sector worksites are subject to current VOSH regulation, DOLI VOSH inspectors are limited in their ability to compel compliance at worksites in the public sector. DOLI inspectors cannot use the threat of criminal and civil penalties to encourage public sector employers to correct violations of VOSH regulations nor can they obtain a court order compelling public sector employers and employees to cooperate with VOSH complaint investigations.

This regulatory change subjects public sector employers and employees to the same civil and criminal penalties as are private sector employers and employees who obstruct a VOSH complaint investigation or who willfully fail to correct a cited violation of VOSH regulation. DOLI will be able to issue fines to non-compliant public sector employers or employees that will be paid out of their publicly funded budget. These fines will likely focus any affected department's attention on both the need for compliance and the advisability of continuing the employment of individuals who are responsible for creating or continuing violative work conditions. Additionally, DOLI will no longer have to rely strictly on the voluntary cooperation of political entities to investigate complaints involving public worksites. The proposed regulation will allow DOLI to seek administrative search warrants from local court systems that will compel the release of information.

The citizens of the Commonwealth are likely to benefit from this regulatory change both directly and indirectly. Directly, citizens who work for political entities will likely enjoy a safer workplace. Indirectly, citizens who collectively pay for public sector worksites will likely benefit as fewer costly accidents occur on those worksites.

Language in the current VOSH regulation that differentiates between formal complaints and informal complaints is obsolete as DOLI changed complaint policies approximately 8 years ago to reflect policy changes at OSHA. This proposed regulation codifies longstanding DOLI practice with regard to allegations of violative worksite conditions. Because of this, there will likely be no additional economic implications, positive or negative, attached to dropping the obsolete language.

Current regulation specifically states that all case documents except for orders of abatement, issued citations, and proposed penalties are not available for public dissemination until final disposition of the case by either the commissioner of DOLI or by a court of competent jurisdiction. The board proposes to allow DOLI to release all case documents, subject to FOIA restrictions, upon written request but only if the documents in question have been previously subpoenaed or have been the subject of a discovery request.

This regulatory change will benefit the families of those killed or incapacitated by accidents that involved VOSH worksite violations because they will no longer have to wait until the final disposition of any open VOSH complaint before getting full information about their family member's death or incapacity. More generally, the public at large will also benefit from being able to get information VOSH violations or accidents caused by VOSH violations.

Currently, VOSH is silent as to how multi-employer worksite violations will be cited; although DOLI policy mirrors OSHA regulation in holding general contractors responsible for dangerous working conditions at worksites over which they have care and control. A general contractor bears responsibility for any unsafe conditions at a construction site he controls even if his subcontractor actually created those unsafe conditions and even if none of the general contractor's own employees are affected by those conditions. This is true so long as the general contractor could have reasonably known of the violative conditions but did nothing to address them. In May 2005, the Virginia Court of Appeals held that DOLI could not enforce its multi-employer worksite policy because it had not been formally promulgated into VOSH. The board proposes to amend VOSH to specifically include regulation of multi-employer worksites and to reflect DOLI's longstanding multi-employer worksite policy.

The proposed regulation simply codifies longstanding DOLI practice with regard to multi-employer worksites so there will likely be no additional economic implications, positive or

negative, attached to the formal promulgation of this practice. DOLI does estimate, however, that if they had not already implemented multi-employer worksite policies, general contractors would incur approximately \$47,000 in fines per year (based on current violation trends for multi-employer worksites) because of the codified requirements in the proposed regulation. In addition, if this promulgated change reflected a change in policy, general contractors would likely incur greater insurance costs as they would then be at greater risk for being held liable for the actions of their subcontractors.

Businesses and Entities Affected

The proposed regulation affects all private worksites in the Commonwealth except for those that are physically located in Federal enclaves. All State and Local public worksites are also subject to VOSH. DOLI reports that 197,730 businesses with 3,375,318 employees are subject to regulation under VOSH.

Localities Particularly Affected

The proposed regulation will affect all localities in the Commonwealth.

Projected Impact on Employment

The proposed regulation will likely have no impact on private employment in the Commonwealth since all substantive changes to VOSH have already been DOLI policy for some time. The regulatory changes that affect public employers and employees will likely have no impact on the number of people employed in the public sector. These changes may, however, have an adverse impact on the continued employment of specific employees that willfully violate VOSH regulations as their public sector employer will be responsible for paying their fines.

Effects on the Use and Value of Private Property

The proposed regulation will likely have no impact on the use or value of private property.

Small Businesses: Costs and Other Effects

DOLI reports that 197,730 businesses with 3,375,318 employees are subject to regulation under VOSH; Approximately 95% of these are small businesses. Since the proposed regulation does not change DOLI practice regarding these businesses, there are likely to be no added bookkeeping or implementation costs for which small businesses would be responsible.

Small Businesses: Alternative Method that Minimizes Adverse Impact

The proposed regulation is not likely to have a practical impact on small businesses.